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No. 90-1573

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

VILLAGE OF CRESTWOOD, ILLINOIS, and CHESTER STRANCZEK, Mayor of Crestwood, Illinois, in his official capacity,

Petitioners,

v.

JOHN DOE,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners, the Village of Crestwood, Illinois, and Mayor Chester Stranczek, in his official capacity, submit this reply in support of their petition for a writ of certiorari in this case.

In his brief in opposition, respondent John Doe devotes scant attention to the merits of the underlying dispute. Rather, he argues that procedural obstacles prevent review of this case. Specifically, respondent argues that the case is moot and that it is inappropriate for the Court to consider this case because the record is not fully developed. Both of these arguments result from respondent's

decision not to file suit until the afternoon before the mass. Neither of these arguments precludes consideration of the merits of this case.

I.

THIS CASE IS NOT MOOT.

This case is not moot because it falls squarely within the "capable of repetition, yet evading review" exception to the actual case-and-controversy requirement. *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). A situation is "capable of repetition, yet evading review" where "(1) the challenged transaction was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). This case satisfies both of these requirements.

A. This case satisfies the first prong of the *Southern Pacific/Weinstein* test: the "challenged transaction," *i.e.*, the injunction of the festival's mass, "was in its duration too short to be fully litigated prior to its cessation or expiration." *Id.* Despite substantial advance publicity, respondent did not file suit to enjoin the Italian mass until the afternoon of the day before the mass was scheduled to take place. After hearing brief oral argument, the district court issued the temporary restraining order at 6:00 p.m. the same day. About an hour later, petitioners filed a short emergency motion with the Court of Appeals seeking a stay of the district court's order. This motion was denied early the following afternoon, and the mass was not held in the park as planned.

This Court has held that orders having a longer life than the order at issue here satisfy the "evading review" element of the *Southern Pacific* exception. *See, e.g., Burlington N.R. Co. v. Maintenance of Way Employees*, 481 U.S. 429, 436 n.4 (1987) (injunction on secondary picketing in railway dispute); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546-47 (1976) (protective order on press coverage of criminal trial). If the Court declines to address the issues in this case on the ground of mootness, "the dispute will evade review, or at least considered plenary review in this Court, since [the] orders are by their very nature short-lived." *Nebraska Press*, 427 U.S. at 547.

B. This case also satisfies the second prong of the *Southern Pacific/Weinstein* test: there is a "reasonable expectation" that the Village of Crestwood will "be subjected to the same action again." *Weinstein*, 423 U.S. at 149. The Village has traditionally permitted ethnic festivals, including traditional religicus celebrations, to proceed on Village property. A-2.[1] Indeed, the Village received a request dated February 14, 1991 from the Polish American Community Fair Organization for permission to host a Polish festival at the Village's Caesar Park. As the request for permission states, this festival will include an ethnic Polish mass. A-79.

The Village will issue this permit. The Village does not intend to sponsor the Polish mass, but it also did not intend to sponsor the mass at the 1990 Italian festival. *See* A-7, A-22–A-24. Hence, it is reasonable to expect that respondent or someone else will file an eleventh-hour lawsuit to enjoin the celebration of the planned ethnic Polish mass

[1] Appendix pages A-1 through A-78 are appended to the Petition; pages A-79 through A-81 are appended to this Reply.

on Village property. By waiting until the last moment again, the respondent (or his counterpart) will be able to deprive the Village of any meaningful opportunity to establish that it is not sponsoring the mass. The decision below may well be used as precedent against the Village under these circumstances, unless this Court addresses this issue now.

Carroll v. Princess Anne, 393 U.S. 175 (1968), demonstrates that this case satisfies the "capable of repetition" element of the *Southern Pacific* test. The petitioners in *Carroll* were members of a white supremacist group that held a public rally in Princess Anne, Maryland, on August 6, 1966. At this rally, petitioners made militantly racist speeches to a crowd of whites and blacks, and then announced that the rally would resume the following night. *Id.* at 176. The next day, local officials obtained an *ex parte* order from a state court that restrained petitioners from resuming the rally for ten days. *Id.* at 177. After a trial, the court extended the effect of its earlier order for ten months. The Maryland Court of Appeals affirmed the ten-day order but reversed the ten-month order as unreasonable.

Petitioners sought certiorari to challenge the long-expired ten-day restraining order. Because petitioners planned to hold rallies in the future and had sought permits to do so from respondents, *id.* at 178 n.4, this Court recognized that the challenged situation likely would recur, and that it was important to resolve the underlying question. *Id.* at 179. Consequently, this Court held that the case was not moot, and addressed the issue of "whether, by what processes, and to what extent the authorities of the local governments may restrict petitioners in their rallies and public meetings." *Id.*

The *Carroll* Court further noted that its decision to address the merits was appropriate in light of petitioners' compliance with *Walker v. Birmingham*, 388 U.S. 307 (1967). In *Walker*, the Court had held that an enjoined party cannot challenge the constitutionality of an injunction in the contempt proceedings that follow a violation of that injunction; instead, the proper procedure is to obey the injunction and seek judicial review. Because the *Carroll* petitioners "pursued the course indicated by *Walker*," the *Carroll* Court "[could] not say that their case is moot." 393 U.S. at 179.

The Village also proceeded in accordance with *Walker*: it obeyed the restraining order and attempted to pursue its appeal but never received the opportunity to brief or argue the merits of its appeal in the court of appeals. Further, as in *Carroll*, the Village has established that the challenged situation will recur in the future. In addition to the Italian festival, the Village has held Polish festivals with traditional Polish masses on Village property for the past six years. A-2. And the Village currently has before it an application for a permit to hold the seventh annual Polish festival at which a traditional Polish mass will again be celebrated. A-79. As noted above, the Village intends to issue the permit, which likely will prompt litigation all over again.

C. The fact that the district court dismissed the complaint at petitioners' request is irrelevant to the question whether this case is "capable of repetition, yet evading review." Once the traditional Italian mass was restrained, all that remained of the complaint was a request for permanent injunctive relief against petitioners. Because the Village then had no plans to sponsor any masses, as petitioners' motion to dismiss and supporting papers accurate-

ly point out (Opposition App. 1a-18a), there was nothing to enjoin. Further litigation in the district court on respondent's complaint would have been a meaningless exercise.

The dismissal of the complaint, however, did not moot the very live issue of whether the lower courts erred in issuing and upholding the order that restrained the traditional Italian mass. Indeed, the very essence of the "capable of repetition, yet evading review" doctrine is that the resolution of the immediate controversy between the parties does not moot the case because there is a reasonable expectation that the issues involved will recur. *See Porter v. Warner Co.*, 328 U.S. 395 (1946).

D. Finally, based on its conclusion that respondent was a "prevailing party" under 42 U.S.C. § 1988, on April 23, 1991, the district court ordered the Village to pay respondent's attorneys' fees and expenses in the amount of $14,597.08 for the trial and appellate court proceedings. A-80. If this Court takes this case and reverses the decision below, the respondent will no longer be a "prevailing party." Consequently, the district court will be required to vacate its fee award and instead order respondent to pay petitioners' fees, as they would be the prevailing parties. For that reason as well, this case is not moot.

II.

IF THIS CASE WERE MOOT, RESPONDENT WOULD NOT BE A PREVAILING PARTY UNDER 42 U.S.C. § 1988.

Respondent's argument under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), contradicts his argument that this case is moot. If this case were moot—it is not—it would have become moot in the afternoon of August 11,

1991, after the court of appeals denied the Village's emergency stay motion, A-1, when the Village obeyed the district court's restraining order. Hence, the case would have been moot for 2½ months when the court of appeals, without the benefit of briefs from the parties, issued its opinion, and for 3½ months when the district court dismissed the remainder of respondent's complaint, *i.e.*, his request for a permanent injunction.

Moreover, two justices of this Court have stated that where a case becomes moot before it travels the full appellate course, there can be no "prevailing party" within the meaning of the 42 U.S.C. § 1988, and therefore no award of fees under that statute. In *Alioto v. Williams*, 450 U.S. 1012 (1981), dissenting from the Court's decision to deny a petition for a writ of certiorari, then Justice Rehnquist, with Justice White, opined that parties should not be forced to bear an award of fees where their case became moot before they had been finally determined to have violated the law and where they have steadfastly maintained their innocence. *Id.* at 1013-14. Justice Rehnquist suggested that in these circumstances the courts should follow the procedure outlined in *Munsingwear*, 340 U.S. at 39-40, of vacating the judgment of the court of appeals and remanding the case with instructions to dismiss the complaint. *Id.* at 1014. *See also Kay v. Douglas*, 484 U.S. 1032 (1987) (White, J., dissenting from denial of writ of certiorari).[2]

[2] This Court also recently raised the question of whether an award of Section 1988 fees is appropriate where the judgment was mooted after the judgment was rendered but before the losing party could challenge its validity on appeal. *Lewis v. Continental Bank Corp.*, 110 S.Ct. 1249, 1256 (1990). The Court did not answer the question because it had not been raised below. The Court instead suggested that the lower courts consider it upon remand.

Petitioners have never had the opportunity to submit full argument to any court on the propriety of the district court's restraining order. At the same time, petitioners have steadfastly maintained that their conduct did not violate the Establishment Clause. Consequently, if this Court concludes that this case is moot, it should vacate the judgment of the court of appeals and remand the case with instructions to vacate the award of attorneys' fees and expenses.

III.

REVIEW OF THE COURT OF APPEALS' DECISION IS WARRANTED.

Respondent's argument that this case is not appropriate for review ignores the fact that the record in this case owes its brevity exclusively to his unexplained eleventh-hour filing. If this Court accepts this as a reason for declining to hear this case, it will only encourage such last-minute filings, and will leave petitioners hostage to a respondent who can avoid full litigation of these issues in future cases simply by repeating his tardy filing.

More important, the record in this case provides a sufficient basis on which this Court may decide the two Questions Presented. The district court found that the Village sponsored the mass; the court of appeals affirmed that finding; and petitioners do not now challenge it. (Petition pp. 4-6 & n.1.) The record thus squarely presents the question whether the Village may sponsor this festival mass without violating the Establishment Clause.

Furthermore, petitioners' counsel, the district court, and the dissenting appellate judge all complained of difficulties in understanding and applying *Lemon v. Kurtzman*, 403

U.S. 602 (1971), and the court of appeals majority simply ignored that case in its opinion. It is thus difficult to imagine a more suitable case for reconsidering the *Lemon* test. Indeed, *Lee v. Weisman*, No. 90-1014, presents the very same question to this Court in the context of a public school graduation; by taking this case with *Lee*, this Court will be able to reconsider *Lemon* and Establishment Clause jurisprudence in school and non-school contexts at once.

Finally, now that petitioners have addressed the merits of this case for the first time, respondent has no answer to petitioners' assertion that the decision below "has written the end to more than 200 years of 'religious service[s] under governmental auspices' in this country." (Petition p. 8.) He offers no explanation for the "service carefully arranged for by both houses of Congress" after President Washington's inauguration (Petition p. 9 quoting Stokes, p. 485), for 50 years of regular Sunday services in the House of Representatives, for 100 years of sectarian support for Indian tribes, or for the prayer to the Holy Trinity at President Bush's inauguration. Nor does respondent even suggest, in view of these historical facts, that the *Lemon* test correctly effectuates the purpose of the Establishment Clause.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit be granted and the case set for plenary review.

Respectfully submitted,

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Dated: May 15, 1991

APPENDIX

The Polish-American Community Fair

P.O. BOX 203
CHICAGO HEIGHTS, ILLINOIS
60411

2/14/91

Village of Crestwood Recreation Department,

Once again plans are being made for our three day festival of the Polish American Community Fair Organization to be held at Caesar's Park and Fairgrounds. As in the past, as part of our heritage and tradition we are seeking permission to hold a Mass on Sunday July 28th, 1991 at 10:30 A.M. to culminate our 3 day event on your fairgrounds.

Respectfully Yours

John J. Puzzuoli

President

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN DOE,	)	
	)	
Plaintiff,	)	
v.	)	No. 90 C 4655
	)	
VILLAGE OF CREST-WOOD, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

This Court's April 2, 1991 memorandum opinion and order determined that plaintiff John Doe ("Doe") was the "prevailing party" in this 42 U.S.C. §1983 litigation against the Village of Crestwood and its Mayor Chester Stranczyk (collectively "Village"), thus entitling Doe to an award of attorneys' fees and related out-of-pocket expenses under 42 U.S.C. §1988. Doe's counsel have since then supplemented their petition for fees and expenses, and Village's counsel has orally confirmed in open court that there is no objection to the additional items reflected in that supplement.

Accordingly Doe is awarded an aggregate of $13,715.50 in fees and $881.58 in out-of-pocket expenses, for a total of $14,597.08. Village has asked for a stay of enforcement of any order to pay that amount, but no persuasive reason has been advanced for such a stay. Accordingly Village is ordered to pay the amount of the award forthwith. This

is intended to constitute a final order for the entry of judgment for the payment of that amount.

Milton I. Shadur
United States District Judge

Date: April 22, 1991